IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

DONALD P. EVANS, *Petitioner*,

v.

RUTH B. EVANS.

BRIEF IN SUPPORT OF PETITION.

OPINIONS OF THE COURTS BELOW.

The opinion below, announced on May 28, 1945, is found on page 13 of the record.

The oral opinion of the District Court of the United States for the District of Columbia will be found at page 9 of the record.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

On June 17, 1943, more than four years after the entry of a Nevada decree awarding the petitioner a divorce, the respondent filed in the District Court her complaint for separate maintenance in which she alleged that the parties were residents of the District of Columbia; that they were

married November 19, 1921, in New York City; that the marriage had not been dissolved by any valid decree, and that there is one living child of the marriage, a daughter born August 11, 1923. She further charged that the petitioner contributed to the support of the respondent and their children and had made payments on a jointly-owned residence until the death of a minor son on March 18, 1943, but has since refused to contribute toward the support of respondent, although continuing to contribute to the daughter. It further appeared from the complaint that the petitioner was an employee of the United States with an annual salary of $6820, and that the respondent was likewise a government employee and in receipt of an annual salary of $1440. The respondent and the daughter reside in the home owned jointly by the parties (R. p. 2).

The petitioner filed a motion to dismiss and for summary judgment, accompanied by an answer in which he alleged that on May 25, 1939, he obtained from a Nevada court an absolute divorce from the respondent (R. p. 3), a copy of which decree was attached thereto (R. p. 7).

The petitioner thereafter married in Virginia, where he now resides with his second wife.

Although pretrial depositions of the parties were taken and filed in the cause, they were not offered or received in evidence, or considered by the District Court, and no profert was made by the respondent of the facts, if any, she proposed to establish by her affidavit and deposition, affecting the validity of the Nevada divorce decree, and no objection was made to the action of the trial court in disposing of the case without considering the depositions and affidavits. The court thereupon entered a summary judgment dismissing the complaint (R. p. 11).

SPECIFICATION OF ERROR.

The court below erred in reversing the judgment of the District Court, and thereby denying full faith and credit to the Nevada judgment.

Question Presented.

Was the judgment of the Nevada court, valid in that state, entitled to full faith and credit in the courts of the District of Columbia?

Argument.

1. The decision of the court below, refusing recognition to the Nevada judgment violates Article IV, Section 1, of the Constitution.

Section 1, Article IV, of the Constitution requires that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

Section 905, Rev. States. (U. S. Comp. Stats. 1901, p. 677) provides:

> "that the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

It is not denied that every requirement of due process had been observed insofar as the law of Nevada was concerned. The Nevada court found as a matter of fact and law that the petitioner met all the requirements of residence and domicile, and every procedural requirement of the Nevada law had been observed.

The Nevada decree is prima facie valid and entitled to recognition by the courts of this District.

In *Williams* v. *North Carolina*, 317 U. S. 287, 302, this Court said:

> "In the first place, we repeat that in this case we must assume that petitioners had a bona fide domicil in Nevada, not that the Nevada domicil was a sham."

The Court further said, page 303:

> "It is a Constitution which we are expounding—a Constitution which in no small measure brings separate

sovereign states into an integrated whole through
medium of the full faith and credit clause. Within
limits of her political power North Carolina may
course, enforce her own policy regarding the marr
relation—an institution more basic in our civiliz
than any other. But society also has an intere
the avoidance of polygamous marriages, (Loug
v. Loughran, 292 U. S. 216, 223, 78 L. ed. 1219,
54 S. Ct. 684) and in the protection of innocent
spring of marriages deemed legitimate in other
dictions. And other states have an equally legiti
concern in the status of persons domiciled there a
spects the institution of marriage. So when a cou
one state acting in accord with the requiremen
procedural due process alters the marital status o
domiciled in that state by granting him a divorce
his absent spouse we cannot say its decree shou
excepted from the full faith and credit clause n
because its enforcement or recognition in another
would conflict with the policy of the latter."

And in a concurring opinion by Mr. Justice Fra
ter, on page 306, he stated:

"There is but one respect in which this cour
within its traditional authority and professional
petence, contribute uniformity to the law of ma
and divorce, and that is to enforce respect fo
judgment of a state by its sister states whe
judgment was rendered in accordance with s
procedural standards. As the Court's opinion s
it is clearly settled that if a judgment is bind
the state where it was rendered, it is equally b
in every other state. This rule of law was not c
by the Federal Courts. It comes from the C
tution and the act of May 26, 1790, c. 11, 1 Sta
122, 28 USCA 687. Congress has not exercis
power under the full faith and credit clause t
the special problems raised by divorce decrees.
will be time enough to consider the scope of its
in this regard when Congress chooses to exerci

In the second *Williams* case *supra*, is it said:

> "The fact that the Nevada court found that they were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant."

The Court further said:

> "Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interest of society. Since divorce, like marriage creates a new status, every consideration of policy makes it desirable *that the effect should be the same whenever the question arises.* (Emphasis supplied)

In *Esenwein* v. *Esenwein* (decided May 21, 1945), 13 U. S. L. Week 4439, this Court said:

> "The Full Faith and Credit Clause placed the Pennsylvania courts under duty to accord prima facie validity to the Nevada decree. The burden is on the litigant who would escape the operation of a judgment decreed in another State. * * * The Pennsylvania Supreme Court rightly indicated that if merely the Nevada decree had been in evidence, *it was entitled to carry the day.*" (Emphasis supplied)

It thus seems clear from the decisions of this Court that to justify, in a collateral proceeding, the denial of recognition to the judgment of a sister state, the evidence relied upon to undermine its verity should be clear and convincing. The attack should not be sustained on inference or conjecture.

Do the facts of the instant case clearly and convincingly establish the fact that the petitioner did not acquire a bona fide domicile in Nevada, not withstanding the findings of its court? To answer this question we must look primarily to the affidavit and deposition of the respondent. The affidavit does not purport to be based upon personal knowl-

edge, sets forth no facts which would be admissible in evidence, but contains at most, conclusions of the affiant. It does not show affirmatively that the respondent is competent to testify to the matters stated therein. Her deposition does not, in any respect, reflect light upon the question of the bona fides of petitioner's domicile in Nevada.

Rule 56 (e) of the Federal Rules of Civil Procedure provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

In *Nathel Corporation* v. *West Virginia Pulp and Paper Company*, 141 Fed. (2d) 1 in speaking of the character of the affidavit required by Rule 56 (e) *supra*, the Court said:

> "Its affidavit should have been full and precise on the point in order to prevent summary judgment against it."

And, in *Person* v. *United States*, 112 Fed. (2d) 1, 3 the court said:

> "The second ground for attack upon the summary judgment procedure is that the court considered a supporting affidavit not made 'on personal knowledge', as required by Rule 56 (e). The rule contains such a requirement and this affidavit does not conform thereto, and, therefore, is of no avail."

Tested by the rule and the foregoing decisions construing it, can it be said that the respondent's affidavit and deposition were sufficient to raise such a genuine issue of fact, as could not be decided by the trial court on motion for summary judgment?

Presumably the trial court thought that the affidavit and deposition of the respondent did not meet the requirements of the rule, and therefore declined to consider them in disposing of the motion.

2. In the second *Williams* case *supra*, this Court said:

> "It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions."

The record shows that the respondent was served with certified copies of the complaint and summons thirty days before the entry of the Nevada judgment (R. p. 8).

Furthermore, Section 27 of the Nevada statute approved February 23, 1939, provides in part:

> "In any suit for divorce now pending, or which may hereafter be commenced, the Court, or judge, may in its discretion, upon application, of which due notice shall have been given to the husband or his attorney, at any time, after the filing of the complaint, require the husband to pay such sums as may be necessary to enable the wife to carry on or defend such suit, and for her support and for the support of the children of the parties during the pendency of such suit."

Thus it would seem, that the rights of a wife sued for divorce in Nevada are fully protected, and appropriate opportunity afforded her, including funds provided by the husband, to present her contentions both as to the merits and jurisdiction.

Even after the entry of the decree, the respondent could have seasonably applied to the Nevada court to open the cause and permit her to show that the petitioner had never acquired a bona fide domicile in that state; and if she established her claim, it is to be presumed that the Nevada court would have vacated its decree. However, she apparently acquiesced in the validity of the Nevada decree, taking no action in either jurisdiction to invalidate it, until after the death of the son and the approximate emancipation of the daughter.

If, as in this case, the wife fails to avail herself of the

opportunity, assistance and protection thus afforded, and takes no steps to question the validity of the Nevada judgment until more than four years after its rendition, during which period, the husband, relying upon that decree, has remarried, is it not just and equitable that her laches should bar her from obtaining the relief sought? *Speidel* v. *Henrici*, 120 U. S. 373, 378; *Bliss* v. *Bliss*, 60 App. D. C. 237, 239.

3. The decision of this Court in the second *Williams* case seems distinguishable from the instant action. There it was said:

> "But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders."

The State of North Carolina, unlike the respondent herein, was not a party to the Nevada proceedings and had no effective means for protecting its interests. Presumably, it had no notice or knowledge of the pendency of those actions. It occupied the position of an innocent third party having rights in the subject matter of litigation, to which it was not a party, and had had no opportunity to assert those rights. Obviously, such a party is not precluded from collaterally attacking a judgment rendered in such a proceeding.

Here, however, as previously shown, the respondent was a party, had due notice of the proceeding, and was afforded full opportunity, both before and after the entry of the judgment, to appear and assert her rights. It is accordingly submitted that the instant case is distinguishable from and not controlled by the decision of this Court in the second *Williams* case.

The judgment of the court below may be reviewed on certiorari, because, when entered, it will be final as to the

question presented. *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489, 492. *Davis* v. *Davis*, 305 U. S. 32.

It is of great public importance, in view of the confusion which exists as the result of the decisions of the questions involved, and the possibility of disastrous effects upon innocent persons, that this Court should review and reverse the judgment.

Respectfully submitted,

DONALD P. EVANS,
Petitioner.

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